Central Law Journal.

ST. LOUIS, MO., AUGUST 4, 1893.

The Supreme Court of Missouri has at last solved the question, which has been before it for some time, as to the validity of legislation, in the pretended interest of coal miners, requiring the payment of their wages in cash or its equivalent. In State v. Loomis, recently decided, it is held that Rev. Stat. Mo. 1889, §§ 7058, 7060, making it unlawful for any corporation, person, or firm engaged in "manufacturing or mining" to issue, for the payment of wages, any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable, at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person, or firm, without placing similar restrictions on others employing labor, is unconstitutional, as class legislation. Judge Black, speaking for the court, declares in strong terms the inherent right of all men to make such contracts as they think best. He says "that these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they stand it is difficult to see an end to such legislation and the government becomes one of special privileges. The legislature cannot single out one class of persons who are competent to contract and deprive them of rights in that respect which are accorded to other persons." Last year Judge Thomas, of division No. 2 of the court, held, in a lengthy opinion, to which we called attention at the time, that the statute was constitutional. But this was not agreed upon as the opinion of the court, and the case went to the whole court *in banc* with the result as above stated. The opinion now rendered is concurred in by all the judges except Judge Barclay, who dissents in an able and ingenious opinion. We stated our views upon the question long ago, in commenting upon Hancock v. Yaden (Ind.), wherein a similar act was held constitutional, and further reflection has strengthened us in the belief that such enactments are a species of legislative despotism which should not be tolerated by the courts.

The case of Stocks v. The State, recently decided by the Supreme Court of Georgia, is something of a novelty. While it may be covered in principle its application to the particular facts is certainly new, as we have been informed by those who have made careful examination of the cases. The question that arose was as to former jeopardy in criminal trial. The exact holding of the court, which sufficiently states the facts, is that when during the trial of a capital case, the mother of a juror died, it was not improper for the court to inform the juror of the fact, and to discharge him from further service in the case; and after so doing there was no error in declaring a mistrial, nor in overruling, at a subsequent trial, a plea of former jeopardy based on these facts. It is immaterial whether the accused did or did not consent to the juror's being informed of his mother's death, or to the mistrial, the emergency authorizing the discharge of the juror, and thus ending the trial, being of a nature similar to one which would arise upon the serious sickness of a juror, or of the presiding judge, or sickness in the family of either requiring his personal care and attention, or from other cause which should be recognized as affording in law a sufficient necessity to warrant such action by the trial court. Chief Justice Bleckley dissents in characteristic language upon the ground that one of the main reasons not only for all rules of trial but for trial itself, is protection of the innocent. The law presumes every man innocent until the contrary legally appears. When an innocent man is on trial for a capital felony his life is in peril. "The duty," he says "of preserving an innocent life is higher both morally and legally than that of attending any funeral whatsoever. It follows that when the mother of a juror dies pending the trial of a capital case the true necessity which arises is absence from the funeral not absence from the trial. The juror being set apart and dedicated to the work of delivering the accused from deadly peril, is to be regarded as if in a a far country or confined in chains which cannot be broken. His public trust denies indulgence to his private sorrow. His sacred duty to the dead is canceled by the more sacred duty which he owes to the living."

Other grounds for declaring a mistrial have been laid down by the courts in numbers of

instances, such as illness of a party, sickness of a juror, the end of the term of the court, the inability of the jury to agree, and in one case which occurred in Iowa, illness of the judge's wife. But all the research of the counsel on both sides it appears failed to produce any case like this on its facts. It is apparent that the recent holdings on this subject are more liberal, and that the tendency is to broaden the class of cases in which mistrials can be declared in high grade felonies.

NOTES OF RECENT DECISIONS.

FEDERAL COURTS—JURISDICTION—ADMINISTRATION OF ESTATES.—The Supreme Court of the United States, in Byers v. McAuley, hold that an estate which is in course of administration in a State probate court is *in gremio legis*, and a federal court has no jurisdiction, on the filing of a bill by a citizen of another State against the administrator to recover a share in the property, to take the administration or the estate out of the State court, and itself make a decree of distribution, determining the rights of citizens of the same State as between themselves. Its jurisdiction in such case is limited to determining and awarding the shares of citizens of other States. Mr. Chief Justice Fuller and Mr. Justice Shiras dissented. Mr. Justice Brewer, speaking for the court, says, *inter alia:*

In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application that, where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. Hagan v. Lucas, 10 Pet. 400; Taylor v. Carryl, 20 How. 583; Peck v. Jenness, 7 How. 612, 625; Freeman v. Howe, 24 How. 450; Ellis v. Davis, 109 U. S. 485-498, 3 Sup. Ct. Rep. 327; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. Rep. 355; Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. Rep. 342. In Covell v. Heyman, *supra*, the matter was fully discussed, and in the opinion of Mr. Justice Matthews, on page 179, 111 U. S., and page 356, 4 Sup. Ct. Rep., the rule is stated at length: "The point of the decision in Freeman v. Howe, *supra*, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any State court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all of the remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, State or federal, having jurisdiction over the parties and the subject-matter. And, *vice versa*, the same principle protects the possession of the property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States."

Secondly. An administrator appointed by a State court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court. In Williams v. Benedict, 8 How. 107, 112, it was said: "As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all creditors. The jurisdiction of that court has attached to the assets. They are *in gremo legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction." And in Youley v. Lavender, 21 Wall. 276, it was held that where the statute of a State places the whole estate, real and personal, of the decedent within the custody of the probate court of a county, a non-resident creditor may get a judgment in the federal court against the resident executor or administrator, and come in under the law of the State for such payment as that law marshaling the rights of creditors' awards to creditors of his class; but he cannot, because he has obtained a judgment in the federal court, issue execution, and take precedence of other creditors who have no right to sue in the federal courts; and if he do issue execution, and sell the lands, the sale is void. And in the course of the opinion, on page 280, it was observed: "The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the federal courts in the enforcement of individual rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State, and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter, in contemplation of law, in the custody of the probate court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by

any one. The recovery of judgment gave no prior lien on the property, but simply fixed the *status* of the party, and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property intrusted to him by a court of competent jurisdiction could be taken from him, and appropriated to the payment of a single creditor to the injury of all others. How can he account for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands?" See, also, Vaughan v. Northup, 15 Pet. 1; Peale v. Phipps, 14 How. 368.

There is nothing in any decision of this court controverting the proposition thus stated, that the administrator is the officer of the State court appointing him, and that property placed in his possession by order of that court is in the custody of the court. One of the cases specially relied on by counsel for appellees is Payne v. Hook, 7 Wall. 425. The opinion in that case was written by Mr. Justice Davis, who wrote the opinion in the case last quoted from, and in the latter opinion he said that there was nothing in Payne v. Hook to conflict with the views therein expressed; and, indeed, there was not. Payne v. Hook was the case of a bill filed by one of the distributees of an estate against the administrator and the sureties on his official bond, to obtain her distributive share in the estate of the decedent. Plaintiff was a citizen of Virginia, and the defendant a citizen of Missouri, and an administrator appointed by the probate court of one of its counties. Suit was brought in the Circuit Court of the United States for the district of Missouri. The charge in the bill was gross misconduct on the part of the administrator, and false settlement with the probate court; and that he had, by fraudulent misrepresentations, obtained a settlement with plaintiff for a sum less than she was entitled to. A demurrer to the bill was sustained in the court below, but this court held that the bill was sufficient, and that the demurrer was improperly sustained. In other words, the ruling was that plaintiff, a citizen of another State, could apply to the federal courts to enforce her claim against an administrator arising out of his wrongful administration of the estate. To the objection that the other distributees were not made parties the court replied that it was unnecessary, that it was a proceeding alone against the administrator and his sureties. In the opinion, on page 431, it is said: "The bill under review has this object, and nothing more: It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother, and, in case he should not do it, to fix the liability of his sureties on his bond." There was no suggestion in the bill that the federal court take possession of the estate, and remove it from the custody of the administrator appointed by the State court; no attempt to settle the claims of citizens of the State as between themselves; no attempt to take the administration of the estate, but simply to establish and enforce, in behalf of a citizen of another State, her claim to a share of the estate. That this is the true interpretation of that case is also evident from these quotations from subsequent opinions. Thus, in Ellis v. Davis, 109 U. S. 485, 498, 3 Sup. Ct. Rep. 327, it was said: "In Payne v. Hook, 7 Wall. 425, it was decided that the jurisdiction of the Circuit Court of the United States in a case for equitable relief was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res* which is the subject of the litigation is entitled to administer it. Williams v. Benedict, 8 How. 107; Bank v. Horn, 17 How. 157; Youlev v. Lavender, 21 Wall. 276; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450." And in Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. Rep. 342, after a quotation from the opinion in Payne v. Hook, it is added: "The only qualification in the application of this principle is that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the State." The distinction between that case and this is like that which exists between the cases of Freeman v. Howe, 24 How. 450, and Buck v. Corbath, 3 Wall. 334. In the former of these cases this court held that, when property was in the custody of a United States marshal, under process from a federal court, it could not be taken from him by any process out of a State court; that the possession of the marshal was the possession of the court, and no other court could disturb it; while, in the latter case, it held that an action of trespass could be maintained in a State court against a marshal of the federal court for goods improperly taken possession of, because such an action in no way interfered with the custody of property by the federal court. So here Payne v. Hook established that a citizen of another State could recover from an administrator the share of an estate wrongfully withheld by him, and enforce that recovery by a decree over against the sureties of the administrator's bond; while the opinion of the court below in the present case gives to the federal court power to take possession of property in the hands of an administrator appointed by the State court, and thus dispossess that court of its custody.

Thirdly. The jurisdiction of the federal courts is a limited one, depending upon either the existence of a federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties. There is in the controversies growing out of the settlement of this estate no federal question. The jurisdiction therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other parties may be interested in the question involved is no reason for the federal courts taking jurisdiction of the controversy between such parties.

It is true that when the federal court takes property into its custody, as it does some times by a receiver, it may entertain jurisdiction of claims against that property in favor of citizens of the same State as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of the seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the federal court, it might, by instituting such an administration, and taking possession of the estate through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not, in this case, assume to take possession of the

estate in the first instance; and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

MUNICIPAL CORPORATION—ELECTRIC LIGHT COMPANY—USE OF POLES—COMPENSATION—CONTRACTS OF CITY.—The case of the Citizens' Electric Light & Power Co. v. Sands, 55 N. W. Rep. 452, decided by the Supreme Court of Michigan, is of especial interest. How. Stat. Mich. ch. 127, § 10, provides that companies incorporated to furnish electricity and electric lights may lay, construct, and maintain conductors for conducting electricity through the streets "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." A Manistee city ordinance provides that all poles erected in such city for electric lighting shall be under control of the council so far as to permit their use by other persons for electric lighting on payment of the reasonable portion of their cost. It was held, that a resolution passed by the council of such city, empowering an electric light company to use the poles of another company without fixing the limits of such use, or regulating the manner in which each is to string its wires, is unreasonable and void. Under How. St. ch. 127, § 10, as above set forth, and Manistee City Charter, ch. 20, § 3, giving the council authority to light the public grounds within the city, and chapter 22, § 15, giving the council control over the placing of poles in or over the streets, such city may make contracts for electric lighting with individuals as well as with corporations organized for such purposes.

GIFT — CERTIFICATE OF DEPOSIT — EVIDENCE — DELIVERY.—The case of Telford v. Patton, decided by the Supreme Court of Illinois, and Cook v. Lum, decided by the Supreme Court of New Jersey, involve very much the same principle, are strikingly alike in their facts, and the courts reached the same conclusion. The question in both cases was as to the proof of delivery of a gift of bank deposit. In the Illinois case a man deposited his own money in a bank, taking a certificate of deposit payable to the order of a woman with whom he was on friendly terms, though there was no relationship or engagement of marriage between them. He told no one about the deposit, and kept the certificate in his own possession till his death, eight months later. It was held, that title did not pass to the payee of the certificate, since the evidence did not show either an intent to make a gift or a delivery of the subject of the gift. In the New Jersey case A deposited from time to time with B certain sums of money. A had no voucher for such deposits, but had in her possession a slip of paper containing a column of figures made by B, the sum total of which corresponded with the aggregate of such deposits. With the exception of a date, there was no writing on the paper. A gave to C orally these moneys, and delivered to C the slip of paper in question. It was held such gifts was invalid on the ground that the subject of it was not legally delivered.

REMOVAL OF CAUSES—ADMITTING JURISDICTION OF STATE COURT.—An interesting question of practice in the removal of causes from State to federal courts came before the Court of Appeals of New York in Farmer v. National Life Association, 33 N. E. Rep. 1075. It was held that where defendant, after a substituted service of the summons and complaint, files his petition and bond for the removal of the cause to a federal court, and avers in his petition, as required by the removal act, that there is an action pending in the State court, and that he is a party to it, he submits to the jurisdiction of the State court, and, on the cause being remanded to such court by the federal court, he cannot object that there was not a valid service on him of the summons and complaint; and it is immaterial that his attorney declared, while engaged in effecting the removal, that his appearance was special, and only for the purpose of removing the cause to the federal court. Maynard. J., says:

The defendant, a foreign life insurance corporation, as a condition of its admission to do business in this State, under chapter 346 of the laws of 1884, appointed, in writing, the superintendent of insurance as its attorney, upon whom all legal process against it might be served with the same effect as if it was a domestic corporation, and empowered him, as its attorney, to receive and accept service of such process and declared that such service should be deemed valid personal service upon it. On December 1, 1891, the attorneys for the plaintiff issued the summons and complaint in this action, brought to recover for a death loss upon one of the defendant's, policies, and sent it to the superintendent of insurance, by mail, with a request that he admit service thereof. On December 3d the superintendent returned the papers to the plaintiff, with the statement that he admitted service of process on him, as attorney for the defendant, made by the

plaintiff's attorneys in behalf of plaintiff, and that he had sent to the defendant, by registered mail, a copy of the papers served on him. On December 21st the defendant filed the petition and bond, and took the other proceedings, required by the federal judiciary act for the removal of the cause into the United States Circuit Court for the eastern district of New York, and thereupon the record was removed into that court and filed with its clerk; and the action was pending therein until January 8, 1892, when it was remanded to the State court. On April 15th the defendant moved to set aside the service of the summons and complaint on the ground that it had not been personally served on the superintendent of insurance, and upon the further ground that his admission of service was latally defective, because it did not comply with the essential requirements of section 434 of the Civil Code, which prescribes the contents of a valid admission. The general term has affirmed the denial of this motion by the special term, and the defendant has appealed to this court.

It is unnecessary to consider what force, if any, the objections to the mode of service of process in this case, and to the sufficiency of the admission of service, might have had if they had been seasonably made; for we think it must be held that the defendant necessarily submitted itself to the jurisdiction of the State court, and waived any defect there may have been in the procedure to acquire jurisdiction of its person, by the proceding which it initiated and consummated for the removal of the action into the United States Circuit Court. There could be no transfer of the cause from the State to the federal jurisdiction, unless there was an action pending. The federal statute required it, and the petition must so allege, and must also aver that the petitioner is a party to the action. The legal consequences of this acknowledgment of, and submission to, the jurisdiction of the State court, cannot be avoided by the declaration which the defendant's attorney made while engaged in the act—that his appearance was special, and only for the purpose of effecting the removal of the cause into the federal court. There are undoubtedly cases where the right of a defendant to move to vacate service of process upon him may be saved by a special or qualified appearance for the purpose of making some motion or taking some step in the action which does not amount to a recognition of the jurisdiction of the court of his person; but the rule adopted in such cases has no application where the defendant becomes an actor in the suit, and institutes a proceeding which has for its basis the existence of an action to which he must be a party. He thereby submits himself to the jurisdiction of the court, and no disclaimer which he may make upon the record, that he does not intend to do so, will be effectual to defeat the consequences of his act. As was held in Ballard v. Burrowes, 2 Rob. (N. Y.) 206, under such circumstances the limitation which he attempts to place upon the effect of his conduct is void, because incompatible with the purpose of his act.

We are aware there are many cases in the federal circuit courts which hold that after removal the defendant may move to dismiss the action because of defective service of process in the State court, and that his appearance there for the purpose of taking the necessary proceedings to remove the action is not a waiver of his right to make the motion, especially if he has not appeared generally in the State court. But these decisions apparently rest upon the ground that by the provisions of the act of congress, when the removal is effected, the federal court is authorized to proceed with the action as if it had originally been brought in that court, and that the defendant has a right to have every question which involves the authority of the plaintiff to implead him determined in the federal jurisdiction. If this were not so, it is urged that it would be within the power of the State court to confer jurisdiction of the person upon the federal court by an improper service of process, and the defendant would be precluded from obtaining the judgment of the federal court upon that question. It is thought that the integrity of the federal jurisdiction requires the enforcement of such a rule of practice. But the reasons for the rule cease to exist when the question arises to the State court, and it cannot there be observed, consistently with a proper respect for its own authority. But the federal courts have by no means been unanimous upon this point. Bushnell v. Kennedy, 9 Wall. 387-393; Sweeney v. Coffin, 1 Dill. 73-76; Sayles v. Insurance Co., 2 Curt. C. C. 212. In the most recent reported case on the subject— of McGillin v. Claflin, 52 Fed. Rep. 657—Judge Ricks says that it is "a question as to which there has been great diversity of opinion in the reported cases from the various Circuit Courts of the United States." In Sayles v. Insurance Co., *supra*, Judge Curtis denied a motion to dismiss the action for defective service in the State court, making use of this language: "The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court, and enters it there, and then says he was not obliged to appear at all, and the State court, in effect, had no suit before it. This, I am of opinion, he cannot do. * * * The act of congress allows defendants to remove actual and legally pending suits from the State courts. If this were not such a suit, he should not have brought it here. By bringing it here he voluntarily treats it as properly commenced and actually pending in the State court; and he cannot, after it is entered here, treat it otherwise." The principle thus formulated is, we think, sound, reasonable, and just. It cannot be tolerated that a defendant shall question the jurisdiction of a State tribunal over his person after he has effected a transfer of the cause to another court by placing upon its records an affirmation, under oath, of the pendency of the action, and of his relation to it as a party, and obtained the approval of the court of the bond required as a condition of its removal. If the cause is subsequently remanded, he cannot be heard to say that his own proceedings have, in effect, been *coram non judice*.

HOLIDAYS — ISSUING ATTACHMENT. — One point in the case of Whipple v. Hill, 55 N. W. Rep. 227, decided by the Supreme Court of Nebraska, is worthy of notice. It was held that the statute providing that "no court can be opened nor any judicial business be transacted on Sunday or any legal holiday," etc., does not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due, since that is purely a ministerial and was not a judicial act. Nooval, J., says:

The remaining question to be considered is whether or not the attachment is void because the order was issued on a legal holiday. The solution of the question necessitates an examination of two sections of the statute. By section 9, ch. 41, Comp. St., it is provided that "the first Monday in the month of September in

each year shall be hereafter known as 'Labor Day,' and shall be deemed a public holiday in like manner and to the same extent as holidays provided for in section eight (8), of chapter forty-one (41) of the Compiled Statutes of 1887." A reference to the calender will disclose that the 1st day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor day is based upon section 38, ch. 19, Comp. St., which declares that: "No court cannot be opened, nor can any judicial business be transacted, on Sunday or any legal holiday, except—First, to give instructions to a jury then deliberating on their verdict; second, to receive a verdict or discharge a jury; third, to exercise the powers of a single magistrate in a criminal proceeding; fourth, to grant or refuse a temporary injunction or restraining order." The legislature by the section quoted has prohibited the courts of the State from being opened and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday. It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond the plain import of the words used. Had the legislature intended to debar courts or court officers from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the States, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday. Glenn v. Eddy (N. J. Sup.), 17 Atl. Rep. 145; Kinney v. Emery, 37 N. J. Eq. 339; *In re* Worthington, 7 Biss. 455; Weil v. Geier, 61 Wis. 414, 21 N. W. Rep. 246; Smith v. Ihling, 47 Mich. 614, 11 N. W. Rep. 408; Hadley v. Mussennam, 104 Ind. 459, 3 N. E. Rep. 122; Whitney v. Blackburn, 17 Or. 564, 21 Pac. Rep. 874. The Supreme Court of New Jersey, in Glenn v. Eddy, *supra*, under a statute quite similar to our own, held that a summons might be legally issued and served on the day of a general election, which day is by law made a legal holiday. Magie, J., in delivering the opinion of the court, says: "When the statute declares them to be legal holidays, it does not permit a reference to the legal *status* of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts, as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts, to such actual sessions thereof as would require such attendance." In Weil v. Geier, *supra*, the Supreme Court of Wisconsin, in construing a statute almost identical with the one under consideration, held that the issuance of a summons by a justice of the peace on a legal holiday is permissible, because a ministerial act. To the same effect is Smith v. Ihling, 47 Mich. 614, 11 N. W. Rep. 408. We are convinced that a county judge in issuing an attachment exercises no judicial functions, and such a writ is not void because issued on a legal holiday. The conclusion reached does not conflict with the case of Bank v. Jaffray (Neb.), 54 N. W. Rep. 258. It was there held that an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge Post in his opinion in that case: "When the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment." The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act.

AMENDMENT BY A MUTUAL BENEFIT SOCIETY OF ITS CONTRACT OF INSURANCE.

In the case of ordinary insurance, the policy usually contains the whole contract of insurance and is conclusive as to the intent of the parties.[1] In such a case, of course, there can be no question as to the power of the insurer to effect a modification of the contract of insurance without the expressed consent of the insured, any more than there can be of one party to any other contract. But with reference to mutual benefit societies the case is somewhat different. There the contract between the particular parties is nowhere set out in precise terms; it is not contained in the certificate of membership, but is to be gathered from the charter, constitution and by-laws of the association, in force at the time of the admission of the member, by which the relative rights and duties of the members and of the association are defined and fixed, whether such regulations are referred in the certificate of membership or not.[2]

But one of the powers incident to such associations is that of amending and repealing its constitution, by-laws and regulations and of enacting new ones, and it is a general rule that each member will be bound by such action of the association, whether in fact he as-

[1] Insurance Co. v. Mowry, 96 U. S. 544.

[2] Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 322.

sented thereto or not.[3] The question which it is proposed to discuss is whether this power of amendment will authorize the association to make a material alteration in the contract of insurance itself as fixed by the terms of the constitution and by-laws in force at the time the insured became a member. As a matter of principle it would seem that the relation, of the parties to such a contract, to each other is two-fold: (1) That of an association and its members, and (2) that of insurer and insured. In the former capacity the insured may very properly be held bound to acquiesce in any alteration in the internal organization of the society which is authorized by law and which the majority of the members see fit to effect. But as insured, it would seem that, in many instances at least, he has an actual subsisting property right, for which he has paid a stipulated consideration, of which he cannot be legally deprived without his consent by the insurer, that is, by the governing body of the association.

While the weight of authority, particularly of the later decisions, seems to support this view, the cases are by no means in unison, and quite a number of respectable decisions are found in the books which adopt the doctrine that the member is bound by the action of the association in amending its laws notwithstanding the effect upon his contract. In Fugure v. St. Joseph's Society,[4] the contest was between a voluntary charitable society and the widow of a member. At the time the deceased became a member, the by-laws provided that members paying the regular assessments should be entitled to twenty-five cents per day during sickness; that the society would pay twenty-five cents per day to the widow of each member so long as she remained a widow and enjoyed a good reputation; and that so long as there remained $20 in the treasury the society would not reduce its aid to the sick. The by-laws further provided for amendments thereof and how they should be made. After the death of the plaintiff's husband, who had paid the required assessments up to the time of his death, the defendant association amended its by-laws, in the way provided, so that widows of members should receive twenty-five cents a day only until they had received $200. In a suit by the widow, who had received $200, for a further sum at the rate of twenty-five cents a day, the court held that the society was competent to make the by-law, and having fully performed the duty imposed, the plaintiff could not recover; that there being an express provision in constitution that the by-laws might be changed, pointing out the manner of doing it, the husband voluntarily became a party in the association and contributed his money with full knowledge of all the provisions of the articles and fully assented thereto; that therefore the widow had no vested right which the society could not modify.

The New York Supreme Court declined, under similar circumstances, to go the length of the Vermount court. In Gundlach v. Germania Mechanics Ass'n,[5] where the defendant's articles of association provided that upon the death of one of its members, his widow should be entitled to receive four dollars monthly during widowhood, the court, while sustaining the power of the defendant to amend its articles, held that such an amendment could not be retroactive and that a new article, passed after the death of plaintiff's husband, whereby the allowance to widows was limited to one dollar from each member of the association, could not affect the plaintiff's right to receive the monthly allowance originally provided for. In a later case the same principle was applied where the defendant, a lodge of Odd Fellows, after plaintiff had been taken sick and while he was in receipt of the weekly sum allowed him, passed a by-law reducing the amount from four dollars to one a week. It was held that the right to whatever "sick benefits" the member is entitled to when he is taken sick, is a vested right which cannot be annulled or varied while the disability lasts.[6] But where, in the case of these charitable organizations, the by-law under which the plaintiff claims sick benefits is amended, before his sickness occurs and his claim thereby accrues, there seems to be no room whatever to doubt that the member is bound by the action of the association and that his suit cannot be maintained.[7] The usual undertaking of such or-

[3] Bacon Ben. Soc. § 185.
[4] 46 Vt. 362.
[5] 4 Hun, 339, 49 How. Pr. 190.
[6] Poultney v. Bachman, 62 How. Pr. 466. See to the same effect Pellazzino v. Germ. Catholic, etc. Soc., 16 Week. L. Bul. 27.
[7] McCabe v. Father Matthew, etc. Soc., 24 Hun, 149; St. Patrick's M. Ben. Soc. v. McVey, 92 Pa. St. 510.

ganizations is that if the applicant for "sick benefits" is worthy, to pay him such weekly sum as "the existing by-laws may direct." It is error to regard such an organization as a *quasi*-insurance company.[8]

None of the above cases, however, are strictly applicable, when the contract between the member and the association is really and substantially a contract of insurance, as it usually is in the case of those co-operative or assessment societies which undertake, upon the death of a member in good standing, to pay a certain sum on the proceeds of a certain assessment to his designated beneficiary. In this are the essential elements of a contract of life insurance, made by a mutual company with one of its members. Life is the risk, and death is the event upon which the insurance money is payable. There is not as in ordinary contracts or policies, a stipulation for the payment of premiums fixed, and certain in amount, at the inception of the risk and at periods definitely appointed during its continuance. The payment of a fee for admission to membership, and of the assessments levied and required by the governing body, are usually the equivalent of premiums, and form the pecuniary consideration of the contract. The condition, usually expressed, that the member shall remain a member of the association in good standing is only the expression of that which is implied in all contracts of insurance of members by mutual companies. The members of such companies are presumed to know the charter and by-laws and contract in reference, to them though they be not recited or referred to in the contract.[9] The character and legal effect of the contract, as a contract of insurance is not affected by the fact that the object and purposes of the association are benevolent and charitable, rather than speculative, or the derivation of profits from the transaction of business. Such associations are, in contemplation of law, mutual life insurance companies, and as such their contracts are construed and enforced by the courts.[10] The provisions of the laws of the association, fixing the relative rights, duties and obligations of the society and of the insured member, form therefore a part of the contract of insurance, and it has been repeatedly held that a subsequent alteration of such laws, by the governing body of the association, without the assent of the assured cannot affect his rights under such contract. Thus where a by-law of defendant company, in force at the time the certificate of insurance was issued, and providing that a loss should be payable sixty days after due notice to the secretary of the death of the assured was subsequently amended so as to make the loss payable ninety days after notice, it was held that the amendment had no effect upon the contract of insurance, and that a suit brought more than sixty days after notice of loss would not abate because brought in less than ninety days.[11] The Supreme Court of Iowa in applying this principle said, in a comparatively recent decision, after premising that members of a mutual insurance company are presumed to have knowledge of the articles of incorporation and by-laws: "It does not follow that they will be bound by all those adopted after their contracts of membership are made. Whether they will be or not will depend upon the terms of their contract. If that provide that members shall be bound by articles and by-laws which may at any time be adopted, we know of no reason why it is not valid. In such cases changes made are not in violation of the contract, but are in harmony with it. But this is not a case of that kind. We look in vain for anything in the original agreement which, in terms or by implication, authorized any material change in its provisions or conditions. Hobbs [the deceased member] was qualified to enter into it. The conditions on which the rights it conferred upon the beneficiary should be forfeited were stated, and we think the defendant had no right to alter them at will." In that case the court held that a change in the articles of incorporation, made subsequently to the issue of the certificate of insurance sued on, whereby members of the association were prohibited from engaging in the occupation of coupling cars and providing that the association should not be liable by reason of any injury or death resulting therefrom, was not binding upon the insured and could not affect his rights under the certifi-

[8] St. Patrick's M. Ben. Soc. v. McVey, 92 Pa. St. 510.

[9] Bliss on Life Insurance, § 463, *et seq.*; May on Insurance, § 552.

[10] Commonwealth v. Wetherbee, 105 Mass. 149; Bolon v. Bolton, 73 Me. 299.

[11] Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. Rep. 13. See also Bradfield v. Union Mut. Ins. Co., 9 W. N. Cas. 436; Becker v. Farmers' Mut. Ins. Co., 48 Mich. 610.

cate.[12] In a later case the same court held that, where, at the time of the issue of the certificate of insurance, the only provision as to notices of assessment was contained in the certificate itself, and was that "the said payments to be made within thirty days from the date of notice of said death," it was not competent for the association to subsequently adopt a new article of association providing: "Notice of an assessment shall be deemed to be given when the same is deposited in the post-office, addressed to the party at his last known post-office address," that the notice referred to in the certificate was actual notice, and that, where it appeared that the notice sent by mail to the residence of the member, reached there during his last illness and was not opened or read by him because of his mental incapacity at the time, there was no notice within the contract of insurance and his membership could not be forfeited for non-payment of the assessment.[13]

As was intimated by the Supreme Court of Iowa in deciding the case of Hobbs v. Iowa Mut. Ben. Ass'n,[14] cited above, if the contract of membership expressly provide that the member shall be bound by the laws of the association, which may be adopted in the future, a different question altogether is presented. In such a case the changes subsequently made in the laws of the association are not in violation of the contract of membership but are in harmony with it. The leading case on this subject is the very well considered decision of the Supreme Court of Alabama in Supreme Commandery v. Ainsworth.[15] There the benefit certificate was accepted by the assured "subject to the laws of the order now in force, or which may hereafter be enacted by the supreme commandery." The court held that the subsequent enactment of a law by the terms of which such a certificate was forfeited, if the member whether sane or insane should take his aim of life, did not alter the contract between the parties. Of such a stipulation on the part of the incoming member, the court says: "The members of associations, created for purposes and objects like those which seem to be the purposes and objects of this organization, may be very properly required to assent that the contract conferring upon them rights, shall be subject to, and depend upon the future, as well as the existing laws adopted by the governing power. The fundamental principles of such organizations is the mutuality of duty and equality of rights of membership, without regard to time of admission. This cannot well be preserved if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and experience will develop a necessity for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws and a class exempt from their operation. * * * If the law was applied only to certificates issued subsequent to its enactments, there would be a class of members having certificates of greater value than the certificates held by another class; yet each class would be subject to the same assessments and the same duties."

It is not to be supposed, however, that the power of amending the certificate, or rather, the contract of insurance, which such a stipulation vests in the association is unlimited. Such stipulations impart no more than the observance by the assured of the requirements of the association which are reasonable and intended to promote the harmony of the association, and the purposes and objects for which it was formed. They promise obedience to the by-laws so far as reasonable and consistent with the charter and the law of the land; but they cannot be construed as reserving to the association the power to change or avoid its contracts, to lessen its responsibilities, or to divest its members of rights. Such is not the proper office of a by-law. This limitation is fully expressed by the Alabama court in the case above cited.[16] "There is but little room, if any, for the apprehension, that advantage will be taken by the governing body of the assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or

[12] Hobbs v. Iowa Mut. Ben. Ass'n, 82 Iowa, 107.

[13] Courtney v. U. S. Masonic Ben. Ass'n, 53 N. W. Rep. 238.

[14] 82 Iowa, 107.

[15] 71 Ala. 436. See also Supreme Lodge v. Knight, 118 Ind. 80, 20 N. E. Rep. 479. Compare St. Patrick's M. B. Soc. v. McVey, 92 Pa. St. 510, where the undertaking of the defendant was to pay the member such sick benefits as "the existing by-laws may direct."

[16] Supreme Commandery v. Ainsworth, 71 Ala. 436 451.

modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only where consistent with the charter, and confined to the nature and objects of the association. While a subsequent law, because of the assent of a member, may add new terms or conditions to a certificate, terms and conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force."[17] This idea is happily illustrated by the recent decision of the Supreme Court of Oregon in Wist v. Grand Lodge.[18] There the application for admission to membership in defendant, a mutual benefit association, provided that compliance with all existing regulations of the order, and such as it should thereafter adopt, should be the condition upon which he should be entitled to benefits of the order. A subsequent amendment to the laws of the society required that each member "shall designate" the person to whom the beneficiary fund found due at his death "shall be paid," who "shall in every instance" be a member of his family, a blood relation, or a person dependent upon him. The court held (1) that such subsequent provision of the laws could not be held to be retroactive in its effect and that it did not require the substitution of such relative or dependent for one who had been previously designated as beneficiary; and (2), that even if retroactive, such amendment could not apply to a member who had no family, blood relations or persons dependent upon him, and his previously designated beneficiary was entitled to the fund. The court says in its opinion that such an amendment "is only addressed retroactively to those who can comply with its terms; for while it might have the effect to modify or vary the contracts of all such, it does not operate as a destruction of their power to appoint a beneficiary or as a repudiation of the obligation of the society. They can comply with its terms and make the change of beneficiary and preserve the fund for his benefit. The case is different with Freeman (the member in question.) * * * It was not possible for him to comply with the terms of the law by naming another beneficiary. To give the law such a construction as would include his class, would operate as a complete deprivation of their rights, and an absolute repudiation by the society of its obligations. Such injustice will never be tolerated if by any construction it can be avoided."

The conclusion which is to be fairly drawn from all these decisions would seem to be (1), that in the absence of a stipulation on the part of the member to be bound by subsequently enacted by-laws, the association has no power to materially alter or diminish the value of its contract of insurance with its members; and (2), that even when the member has agreed to be bound by such subsequently enacted laws the power of the association extends no further than to pass such enactments as may be reasonbly for the benefit of the whole organization, and that they will not be so construed as to destroy the rights of members or altogether relieve the society of its contemplated obligations.

WM. L. MURFREE, JR.

[17] Citing Korn v. Mut. Assurance Society, 6 Cranch, 192.

[18] 22 Oreg. 271, 29 Pac. Rep. 610.

CARRIERS — FREIGHT CHARGES — WHO LIABLE.

UNION FREIGHT R. CO. V. WINKLEY.

Supreme Judicial Court of Massachusetts, May 19, 1893.

1. When the vendor of goods delivers them to a railroad to be carried to the purchaser, though the title may pass to the purchaser by such delivery, and the name and address of the consignee, who is the purchaser, may be known to the company, the vendor is presumed to make the contract for transportation on his own behalf, and is liable for the freight, but such presumption may be rebutted by evidence showing that it was understood that the consignee should pay the freight.

2. An employee of defendants, who had sold ice to one H, told the agent of a railroad company that there was a car to go to him, without further instructions. The company billed the car to H *via* connecting carriers. No bill or receipt was given defendants, and the freight charges were made to H by all the carriers, and bills for freight sent to him. Held sufficient to show that it was understood that H, and not defendants, should pay the freight.

FIELD C. J.: The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume, without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Boston & Main Railroad make the contract for transportation,

and who promised that company to pay the freight? There were no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although, as between themselves and Merrick, he was bound to pay it, but they made no such contract, in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself, or be an agent for the owner, and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and the residence of the consignee. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof. Lawrence v. Minturn, 17 How. 100; Blum v. The Caddo, 1 Woods, 64. In Dicey on Parties to Actions (pages 87, 88), the result of the English decisions is stated to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, *i. e.*, the person whose goods they are, and who would suffer if the goods were lost. * * * When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And (*Id.* page 90, note): "When the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or consignee may sue." Dawes v. Peck, 8 Term R. 330: Domet v. Beckford, 5 Barn. & Adol. 522; Coombs v. Railway Co., 3 Hurl. & N. 1; Sargent v. Morris, 3 Barn. & Ald. 277; Dunlop v. Lambert, 6 Clark & F. 600; Railway Co. v. Bagge, 15 Q. B. Div. 625; Cork Distilleries Co. v. Great Southern & W. Ry. Co., L. R. 7 H. L. 269. The cases generally are collected in Hutch. Carr. § 448 *et seq.*; *Id.*, § 720 *et seq.* Most of the English cases were reviewed in Blanchard v. Page, 8 Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that although it was shown that the shipper acted as agent of the consignees, who had bought and paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage, unless he was prohibited by his principal, and it was said that he would be liable for the freight. In Wooster v. Tarr, 8 Allen, 270, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignees or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is Finn v. Railroad Co., 102 Mass. 283, which was upon an implied contract. In that case one Clark had ordered shingles of Finn, who shipped them on his own account, under a bill of lading, on board a canal boat, to be delivered to "the Great Western Railroad Company, or their assignees, at Greenbush, N. Y. Consignee to pay freight on the delivery." And the shingles arrived by boat at the freight station of the railroad company at Greenbush, N. Y. The shingles were described in the bill of lading as marked, "J. S. C. Extra," or "J. S. C." They were burned, while in the freight house, by an accidental fire. They were intended to be transported to Joseph S. Clark, Southampton, Mass. Clark accepted and paid a draft drawn by Finn for the shingles; and, in a suit by Finn against him, Clark pleaded the amount of the draft in set-off, and recovered the amount, on the ground that "the omission of the plaintiff [Finn] to forward the goods with proper directions to the consignee and the place of delivery authorized the defendant [Clark] to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft." Finn v. Clark, 10 Allen 479, 12 Allen, 522. Finn then brought suit against the railroad company for its failure to forward and deliver the shingles to Clark. It was held that although the case of Finn against Clark settled the fact that, as between them, the title to the property remained in Finn, yet the railroad company, not being a party to that suit, could not set up the judgment in it "as an estoppel against Finn upon the question of" delivery. Finn v. Railroad, 102 Mass. 283. At the second trial the plaintiff obtained a verdict, and the facts stated in the exceptions showed "that the title to the property had passed to Clark before the loss occurred, leaving Finn, at most, only right of stoppage *in transitu*;" and it was in this aspect of the case that the opinion in 112 Mass. 524, was delivered. The contention of the plaintiff was that the shingles had been delivered to the railroad company with proper directions for their transportation, and that the defendant had neglected to transport them, whereby they had been burned. In the opinion the court say of the liability of a common carrier that, "*prima facie*, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. * * * When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier

as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon the contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit goods, or if sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser." Although this was not a suit to recover freight, the principles on which it was decided or applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and, if the vendee has ordered the goods to be sent at his risk, and on his account, he also may be held liable as the real principal in the contract. See Byington v. Simpson, 134 Mass. 169. But, whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties. See Railroad v. Whitcher, 1 Allen, 497. In the present case there is no bill of lading or receipt signed by the railroad company, and accepted by the defendants. There was a way bill but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences. Railroad v. Wilder, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company; and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight. Judgment affirmed.

NOTE.—It is difficult to perceive any principle of natural justice, or any rule of positive law, by virtue of which freight charges could be recovered from the consignor in this case. Neither the buyer nor the seller made any contract of transportation with either of the carriers. The receiving carrier assumed to accept and forward the goods, over his own, and also over connecting lines, merely on the strength of verbal directions given by the consignor's servant; and without any sort of direction from either consignor or consignee, each of the three connecting carriers assumed to charge the freight up against the consignee. The discharging carrier assumed to turn the goods over to the consignee without insisting on payment of freight charges, thereby waiving its own lien, and also cutting off the vendor's right of stoppage *in transitu*. These freight charges not being paid, the attempt to recover them from the consignor appears to have been a mere afterthought, and nothing but failure could have been reasonably expected. What this discharging carrier had a right to do, and ought to have done, was to demand from the consignee full payment of all freight charges, and if they were not paid to hold the goods; such a course would have protected all concerned. Alden v. Carver, 13 Iowa, 253. Authorities are not fully in accord as to the character and extent of the carrier's lien. Steiman v. Wilkins, 7 W. & S. 466; Fuller v. Bradley, 25 Penn. St. 120; Miller v. Mansfield, 112 Mass. 260. It has even been held that, as against the real owner, the carrier can enforce no lien on goods delivered to him by a third person. Fitch v. Newberry, 1 Mich. 1; Robinson v. Baker, 5 Cush. 137; Stevens v. R. R. Co., 8 Gray, 262; Clark v. R. R. Co., 9 Gray, 231; Gilson v. Gwin, 107 Mass. 126; Travis v. Thompson, 37 Barb. 236. Every public carrier is unquestionably entitled to a reasonable compensation, and he may look for that compensation either to the person with whom he bargains, or to the goods which he transports; and unless actually notified to the contrary he may rightfully assume that the person offering goods for shipment is the real owner thereof. Where a bill of lading is silent as to terms the law implies a reasonable rate, the rate that is ordinarily paid for like services under like conditions; and, in the absence of concealment, fraud, or mistake, parol evidence is inadmissible to control such legal implication. Louisville, Evansville & Saint Louis R. R. Co. v. Wilson, 119 Ind. 352. When a discharging carrier advances the freight earned by connecting carriers it may hold the goods for regular rates, in the absence of a bill of lading showing an agreement for reduced rates. Georgia R. R. Co. v. Murray, 11 S. E. Rep. 779; D. & R. G. R. R. v. Hill, 13 Colo. 35. Where a receiving carrier guaranties the rate to a point beyond its own line, the discharging carrier has a lien on the goods for its own charges at regular rates, and for all charges advanced by it in ignorance of such guaranty, even though the aggregate amount should exceed the guarantied rate. Loewenberger v. A. & L. R. R., 19 S. W. Rep. 105. And the courts will relieve the carrier against an honest mistake of facts, in the fixing of rates, thus: Goods were shipped from W to B, both on the line of the New York, New Haven & Hartford Railway. Freight was prepaid at W, but by inadvertence on the part of the defendant's cashier the rate named and paid was much too low. Upon discovering this mistake the carrier was allowed to detain these goods, at B, until full payment of the regular rates. Rowland v. N. Y., N. H. & H. R. R. Co., 61 Conn. 103.

CORRESPONDENCE.

SIGNATURE OF PURCHASER TO CONTRACT FOR SALE OF LAND UNDER STATUTE OF FRAUDS.

To the Editor of the Central Law Journal:

I think Mr. Lile by his article published in Vol. 37, p. 24, of the CENTRAL LAW JOURNAL, will cause some

of the legal profession to look into the question as to how far contracts required under the statute of frauds to be in writing, and to "be signed by the party to be charged," are enforceable. In the first place, it must be borne in mind that in actions of this kind, "the party to be charged" always means the defendant. So if the defendant has signed the written memorandum, it does not matter that the plaintiff has not signed, because he, by his act of filing the bill for specific performance, or his complaint for damages, has made the remedy mutual. Mr. Causten Browne, in his work on the Statute of Frauds, § 366, says: "The rule is firmly settled that in equity for obtaining a specific execution, as well as at law for recovering damages, the signature of the party who makes the engagement is all that the statute requires; and this is put upon the ground, in addition to the unqualified language of the statute itself, that the plaintiff by his act of filing the bill has made the remedy mutual." In support of this proposition he cites quite a number of English and American authorities. Mr. Parsons, in Vol. 3, pages 9 and 10, of his work on Contracts, in the text, says: "It is now quite settled, that the agreement need not be signed by both parties, but only by him who is to be charged by it. And he is estopped from denying the execution of the instrument on the ground that it wants the signature of the other party." He cites numerous authorities. Judge Sullivan, who wrote the opinion of the court in the case of Shirley v. Shirley, reported in 7 Blackford, 452, uses this language: "It has been seriously questioned whether the specific performance of a contract would be enforced, where both the parties were not bound to the performance of it by having signed the agreement, on the ground of a want of mutuality in the remedy. The doubt, however, has been abandoned, and the courts have, by numerous decisions, settled the doctrine that a contract signed by the party to be charged, according to the statute of frauds and perjuries, may be enforced by the other." In 1st Smith's Leading Cases (5th American Edition), p. 376, I find this language: "With respect to the signature, it is only necessary that the memorandum should be signed by the party against whom it is sought to enforce the contract." It would seem that under the foregoing authorities, bearing in mind that "the party to be charged," alalways means the defendant, the question so much discussed lately in the JOURNAL could be very easily settled.

W. H. BAIMBRIDGE.

Lawrenceburgh, Ind.

BOOK REVIEWS.

SMITH ON PERSONAL PROPERTY.

The plan and aim of this work, as stated by the author, is "to bring the leading and essential principles of the law of personal property within a narrow compass and in such a compass as to serve the following purposes: First, to furnish the student with the means of acquiring an adequate and discriminating knowledge of the subject without unnecessary and confusing discussion; secondly, the practitioner with a ready and reliable solution of questions arising in the exigencies of his professional business, when time is wanting for extended research; and third, to meet the wants of those outside the legal profession who may desire to obtain a knowledge of the general principles of the subject, as a qualification for business or an essential to a liberal education, but are unable to devote much time to the study." The many years of practice, supplemented by his experience as lecturer and Dean of the Albany Law School, well qualified the author for his self-imposed task. The book is deserving of the highest praise. The subject is well thought out and admirably presented. Without going at length into its contents it will suffice to say that it treats of the characteristics of personal property, of irregular species of property, of the ownership and mode of acquiring title to personal property, of title by original acquisition and by transfer of legacies, and distributive shares, of stock and stockholders, and of miscellaneous species of personal property. Though not by any means an exhaustive treatise upon all branches of the subject the book admirably carries out the plan of its author and is well adapted to the uses for which it was designed. Perhaps it may be out of our province to say, but we shall risk saying it, that we never observed a more flagrant case of what is called "padding" as in this work. The book has all told four hundred and fifty pages. Of these three hundred is text, fifty pages devoted to the index and one hundred to the table of cases. *Verbum sap.* What is known in printer's parlance as "slugs" were used with good effect in the table of case. This, however, does not detract from the merit of the work and we will do the printers the justice to say that typographically the book is very fine. Published by T. H. Flood & Co., Chicago.

VAN FLEET ON COLLATERAL ATTACK.

We have reason to believe that this book is very acceptable to the profession, being on a subject about which little has been written, and one which is every day becoming of greater importance in the work of the practitioner. Its scope may be best indicated by a statement of the subject of its chapters. Chap. I. Principles, analogies, comparisons and definitions. Chap. II. The tribunal—constitutional infirmaties in its organization. Chap. III. The tribunal—statutory and common law infirmities in its organization. Chap. IV. Jurisdiction defined—how given—how adjudicated—mistakes of law or fact. Chap. V. Jurisdiction taken by reason of a mistake of law in construing the constitution. Chap. VI. Jurisdiction taken by reason of a mistake of law in construing a statute on the common law. Chap. VII. Jurisdiction taken by reason of overlooking undisputed law. Chap. VIII. Jurisdiction taken by virtue of defective pleadings, bonds or preliminary matters or in their absence or by virtue of wrongful procedure. Chap. IX. Jurisdiction taken over the person by virtue of defective process, service or proof of service, or in their absence; or by virtue of an unauthorized appearance. Chap. X. Jurisdiction exercised by virtue of a law repealed by implication. Chap. XI. Jurisdiction exercised over the subject matter without color of authority. Chapter XII. Jurisdiction taken over the subject-matter by reason of a mistake of fact. Chap. XIII. Jurisdiction taken over the party or person by reason of a mistake of law or fact. Chap. XIV. Jurisdiction lost by reason of a mistake of law or fact. Chap. XV. Statutes declaring the effect of judicial proceedings. Chap. XVI. Judicial action. Chap. XVII. Presumptions. Chap. XVIII. Foreign judgments. Chap. XIX. Judicial officers, liability of. Chap. XX. Pleading, practice and evidence. Chap. XXI. Estoppel against contesting void proceeding. The above will give the reader a very fair idea of what is to be found in the volume and we have given it at considerable length because the subject is somewhat new and the inquiry naturally arises as to its scope and character. As to the preparation of the book, we must say that the author exhibits a very

large amount of industry and care, even to the niceties of the questions involved. He enters into the discussions of the questions and the reviews of the authorities like one who by experience or learning has authority to speak. He reviews a large number of cases which are cited in foot notes. The book bears the appearance, in every respect, of being substantial and solid. It has about a thousand pages and is well put together. Published by Callaghan & Co., Chicago.

TIFFANY ON DEATH BY WRONGFUL ACT.

The subject of this book is constantly arising in practice, and therefore the work—the first one on its distinct topic, will be found of use. It is essentially a treatise on the law peculiar to the various statutory civil actions, maintainable when the death of a person has been caused by the wrongful act or negligence of another. The statutes by which a right of action in such case has been created are to a great extent modeled upon the English statute known as "Lord Campbell's Act" which was enacted in 1846. It treats in successive chapters of the common law, the statutes, the wrongful act, neglect or default, the beneficiaries, parties, statutes of limitations, matters of defense, damages, pleading and practice, evidence, jurisdiction of State courts, and jurisdiction of federal courts. The text is well written and the citation of authorities is very full. There is an appendix of statutes giving a right of action for injuries resulting in death in force in England, United States and Canada. The book has nearly four hundred pages and is published by West Publishing Co., St. Paul.

QUERIES.

QUERY NO. 1.

A sold B a tract of land, terms cash. C told B he would lend him the money if he would give him a mortgage on the land, and a note with security which was done. In time it turned out that B had forged the name of the security to the note, and C is prosecuting him for forgery. Now, what is C to do? Can he institute a proceeding to rescind the entire contract of sale, and have A to refund the money as though it had been stolen from him, or has he no other recourse except to foreclose his mortgage on the land? X. Y.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT STATED — Payment in Future. — In an action on an account stated defendant cannot insist that he promised to pay in the future, after performing other acts, and that performance thereof does not appear, unless he interposes such defense.—BAIRD V. CRANK, Cal., 33 Pac. Rep. 63.

2. ADMINISTRATION—Election to Take under Will.—Rev. St. § 2172, provides that a widow shall be deemed to have elected to take under her husband's will unless, within one year after his death, she file a notice of her election to take the provision made by law: Held, that where a widow sealed and acknowledged her notice of election to take the provision made by law for her, but died before filing it, the election was not complete, and a filing thereof by her executor, though within one year after the death of her husband, did not make such election valid.—IN RE GUNYON'S ESTATE, Wis., 55 N. W. Rep. 152.

3. ADULTERY—Proof of Marriage.—Marriage is a civil contract requiring in all cases for its validity only the consent of parties capable of contracting. The fact of marriage may be proved by the testimony of one of the parties.—BAILEY V. STATE, Neb., 55 N. W. Rep. 241.

4. ALIMONY—Exemptions—Pensions.—It is no ground for reversing a decree commanding a defendant to make certain payments for the support of his wife that his only means of obeying the order are from money received, or to be received, for a government pension, since such order does not direct the seizure of any specific sum of money before it reaches the defendant, and pension money being designed in part for the support of the pensioner's family. — TULLY V. TULLY, Mass., 34 N. E. Rep. 79.

5. ATTACHMENT. — The defendant may at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment as to the whole or a part of the property attached.—GUEST V. RAMSEY, Kan., 33 Pac. Rep. 17.

6. ATTACHMENT—Chattel Mortage.—In the action of a judgment creditor against the debtor, the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated.—MCCORD-BRADY CO. V. KRAUSE, Neb., 55 N. W. Rep. 215.

7. ATTACHMENT — Evidence — Declarations. — The declaration of a trustee of a corporation, who owns two-thirds of its corporate stock, that the corporation started with a clear balance sheet, is admissible in attachment proceedings against the corporation, brought because of its shortly afterwards contracting a fraudulent indebtedness to the trustee, and disposing of its property to him with intent to defraud creditors —JOSEPHI V. MADY CLOTHING CO., Mont., 33 Pac. Rep. 1.

8. ATTACHMENT—Execution.—Where two attachment suits are begun, returnable to the same term of court, and the writs are levied on personal property, and the first suit is dismissed at the instigation of a judgment creditor who levied an execution on the property after the levy of the first attachment writ, and before the levy of the second attachment writ, and the second attachment suit is prosecuted to judgment at a subsequent term, the lien of said execution is superior to that of the second attachment and judgment, since Rev. St. 1891, ch. 11, § 37, which provides that all judgments in attachment against the same defendant returnable at the same term shall share *pro rata*, has no application to such case.—PALTZER V. NATIONAL BANK OF ILLINOIS, Ill., 34 N. E. Rep. 34.

9. BOUNDARIES — City Streets.—In ascertaining the true line of a city street, fences built by adjoining lot owners on the line of the steet, according to stakes set by the surveyor soon after the original survey was made, and maintained for 45 years, are better evidence of the location of such line than a new survey, made 40 years after the original survey, which changes such line.—CITY OF RACINE V. EMERSON, Wis., 55 N. W. Rep. 177.

10. CARRIERS OF GOODS—Unlawful Discriminations.—In an action by a shipper to recover damages under a statute forbidding discrimination in freight rates, the railroad company cannot set up in justification of the lower rates a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party releases the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defense would practically emasculate the law.—UNION PAC. RY. CO. V. GOODRIDGE, U. S. S. C., 13 S. C. Rep. 970.

11. CERTIORARI—Petition.—Under Gen. St. 1883, § 1995, a petition in *certiorari* in the county court to review a

judgment of a justice must state that the judgment was not the result of negligence on plaintiff's part; that the judgment, in plaintiff's opinion, is erroneous, specifying the injustice; and that it was not in his power to take an appeal in the ordinary way, setting forth the circumstances.—WOOD v. LAKE, Colo., 33 Pac. Rep. 280.

12. CHATTEL MORTGAGES — Description.—The following description of the chattels in a chattel mortgage: "One sorrel horse, twelve years old, called 'Tom,' and one iron gray horse, four years old, called 'Hurk,'"—though the situation thereof is not named, is sufficient, and, when recorded, the mortgage is notice to all purchasers, whether they have actual notice or not.—KOEHRING v. AULTMAN, MILLER & CO., Ind., 34 N. E. Rep. 30.

13. CHATTEL MORTGAGES—Priority—Fraud.—A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds maintain an action to avoid the senior mortgage for fraud in its inception, without proof that the facts constituting the fraud were discovered after the agreement and sale.—ROCKFORD WATCH CO. v. MANIFOLD, Neb., 55 N. W. Rep. 236.

14. CHATTEL MORTGAGES—Validity — Delivery.—The provision of Comp. St. div. 5, "General Laws," ch. 92, that no mortgage of goods shall be valid as against the rights of any other person than the parties thereto unless accompanied by delivery, or the mortgage provide that the mortgagor may remain in possession, and be accompanied by affidavits of the parties thereto, and be acknowledged and recorded, applies to a bill of sale made by a debtor to his creditor, and a contemporaneous agreement that if the debt is paid within a fixed time the bill of sale shall be canceled, and, such formalities not being observed, the transaction is void as to the debtor's assignee for the benefit of creditors.—STORY v. CORDELL, Mont., 33 Pac. Rep. 6.

15. CONSTITUTIONAL LAW — County Officers. — The county government act of 1883, as amended in St. 1889, p. 232, fixed the salaries of district attorneys, making them full compensation for all services, including deputies. The county act of 1891 also fixed the salaries of said attorneys, but provided that the deputies should be paid by the counties as other officers: Held, that an attorney elected before the act last named took effect was not entitled to have his deputies paid by the county, as this would be an increase in salary during his term, within Const. art. 11, § 9.—WELSH v. BRAMLET, Cal., 33 Pac. Rep. 65.

16. CONTRACT — Conditions. — A contract to accept drafts thereafter to be drawn upon certain conditions can be made the basis of a recovery by the payee of such drafts only upon showing full and exact compliance with each of said conditions.—PALMER v. RICE, Neb., 55 N. W. Rep. 256.

17. CONTRACT — Damages. — A railroad company entered on land under an agreement with the owner that it would build its road from a point near the center of a city through such owner's land. The company built a portion of its road, including the part through the land in question, but failed to build the portion running near the center of the city, which portion, if built, would have greatly increased the value of such land: Held, that the land-owner was entitled to recover from the company the amount it would cost to place his land in the same condition as before entry by the company.—SMITH v. LOS ANGELES & P. RY. CO., Cal., 33 Pac. Rep. 53.

18. CONTRACT — Measure of Damages.—In a suit for violation of a contract, the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed.—BATES v. DIAMOND CRYSTAL SALT CO., Neb., 55 N. W. Rep. 258.

19. CONTRACT TO DELIVER GOODS.—A written contract reciting that "on demand I promise to deliver to the order of F $800 in wall paper, at wholesale price, good, clean, assorted stock out of my store," is unambiguous, and means that such "wholesale price" is to be determined as of the time demand is made for the paper.—FAWKNER v. LEW SMITH WALL PAPER CO., Iowa, 55 N. W. Rep. 200.

20. CONTRACTS—Rescission.—Plaintiff agreed in writing to sell to defendant a certain lot, and received $100 as part payment on the purchase price. Afterwards defendant stated to plaintiff that he did not want the lot, and that he had got to lose the $100 paid. To this plaintiff only replied that he (plaintiff) "must see about it:" Held, that the conversation did not constitute a rescission of the contract, nor estop defendant to insist on his equitable interest in the lot, even if a parol surrender of such interest would be valid.—O'DONNEL v. BRAND, Wis., 55 N. W. Rep. 154.

21. CONEVRSION—What Constitutes.—Where defendant, who owned the building in which were certain chattels bought by plaintiff, locked up such chattels, and prevented their removal, he was guilty of a conversion, and a recovery might be had for their value.—HUGHES v. COORS, Colo., 33 Pac. Rep. 77.

22. CORPORATION—Judicial Sale of Property.—An officer of a corporation for pecuniary profit, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser. A stockholder of a corporation, who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation, should commence proceedings within a reasonable time after such sale, and must, when such proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based.—HORBACH v. MARSH, Neb., 55 N. W. Rep. 286.

23. COUNTY SEAT—Petition for Removal.—To entitle a county board to call an election, for the removal of a county seat, a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election.—CREWS v. COFFMAN, Neb., 55 N. W. Rep. 265.

24. COVENANT—Assumption of Lease.—Plaintiff company, in leasing a theatre building owned by it to another company, obtained a covenant from defendant, a stockholder in the latter company, that, if the leasing of the building caused the occupant of a saloon therein to give up his lease, defendant would assume it. The saloon keeper did give up his lease, and the jury found that it was a result of the change in the control of the building: Held, that the covenant by defendant was an original undertaking, and he was not merely a surety for the saloon keeper.—ACADEMY OF MUSIC CO. v. DAVIDSON, Wis., 55 N. W. Rep. 172.

25. CRIMINAL EVIDENCE—Letters of Third Persons.—Letters written by third parties in another State to third parties in this, but not in answer to letters written by the accused, nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.—BEDFORD v. STATE, Neb., 55 N. W. Rep. 263.

26. CRIMINAL LAW—Bill of Exceptions.—Under Rev. St. 1889, § 2168, providing that a bill of exceptions may be filed "at the time or during the term at which it is taken, or within such time thereafter as the court may, by order entered of record, allow," a bill filed after the term at which the exceptions were taken cannot be considered unless the record shows an order of court extending the time.—STATE v. RYAN, Mo., 22 S. W. Rep. 476.

27. CRIMINAL LAW—Rape.—Rev. St. § 4381, provides that "any person who shall ravish and carnally know any female of the age of 12 years or more by force and against

her will" shall be guilty of a felony. Section 4669 provides that an information for a statutory offense shall be good, after verdict, if it describes the offense in words of substantilly the same meaning as those of the statute: Held, that an information which charged that defendant did with force and arms "violently" and "feloniously" make an assault on such female, and did "violently" and against her will "feloniously" ravish and carnally know her, sufficiently stated the statutory offense. A verdict of guilty of an assault with intent to commit rape will be sustained under an information charging the crime of rape, since the lesser crime is necessarily included within the greater.—STATE v. MUELLER, Wis., 55 N. W. Rep. 165.

28. CRIMINAL PRACTICE — Indictment—Allegation of Time.—An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad; the provisions of Code, § 4306, that no indictment is insufficient for want of an allegation of the time, of any material fact when the time has once been stated, and of section 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable.—STATE v. SMITH, Iowa, 55 N. W. Rep. 198.

29. CRIMINAL PRACTICE—Lascivious Cohabitation.—An indictment which charges that the defendants "did lewedly and lasciviously abide and cohabit" together, is sufficient after verdict, although it uses the word "abide," where the statute used the word "associated."—COMMONWEALTH v. DILL, Mass., 34 N. E. Rep. 84.

30. CRIMINAL PRACTICE — Lottery.—An indictment which charges the defendant with disposing of one suit of clothing, of the value of $35, by way of lottery, without stating the name of the person to whom the clothing was disposed of, or that his name is not known, is defective.—COMMONWEALTH v. SHEEDY, Mass., 34 N. E. Rep. 84.

31. CRIMINAL TRIAL—Comments on Defendant's Evidence.—The testimony of a defendant who has taken the witness stand and given testimony to be considered by the jury may be commented on by counsel in the same manner as the other testimony in the case, and it is not error in such a case to permit counsel for the State to comment on his failure to testify with reference to material matters within his knowledge.—STATE v. GLAVE, Kan., 33 Pac. Rep. 8.

32. DECEIT—Representations as to Future Events.—A complaint in an action for damages, alleging that defendant, in order to induce plaintiff to lease from him certain premises, fraudulently concealed the fact that a certain building thereon did not belong to him, but which fails to allege that defendant knew or had reason to know that plaintiff was ignorant of the fact that defendant did not own such building, and that the leasing of the premises by plaintiff was actually induced by such concealment, is demurrable for failure to state a cause of action.—SHELDON v. DAVIDSON, Wis., 55 N. W. Rep. 161.

33. DECREE—Unknown Parties.—A decree rendered by default against the unknown heirs of a person supposed to be dead is void where such person is in fact alive at the time the decree is rendered, and is not a party to the suit.—BURTON v. PERRY, Ill., 34 N. E. Rep. 60.

34. DEED — Construction.—A deed recited that the grantors "convey and warrant" to B "a life estate in the following real estate" (describing it), and "hereby convey the said real estate to the said B, to be held, used, and occupied for and during the natural life of the said B, and at the death of the said B to the children of the body of the said B in fee-simple:" Held, that such deed conveyed to B life estate only, since "children" is a word of purchase, and not of limitation.—BURNS v. WEESNER, Ind., 34 N. E. Rep. 10.

35. DEED — Construction. — Under a conveyance of land to the grantee to hold "during the term of her natural life and after her death to revert to me and my heirs," the fee in the land remains in the grantor; and where the grantor dies before the grantee the land may be sold, subject to the life estate, to pay the debts of the grantor.—CLARK v. HILLIS, Ind., 34 N. E. Rep. 13.

36. DEED—Defective Certificate.—A deed, in other respects sufficient and regular, is effective, as between the grantor and grantee therein, to pass complete title, even though, executed in a foreign State, it is there acknowledged before only a purported justice of the peace, as to whose genuine signature, official character, and power, there is no accompaning certificate of a proper officer having a seal.—CONNELL v. GALLIGHER, Neb., 55 N. W. Rep. 229.

37. DEED—Insanity.—The deed of an insane person may be avoided, as against a grantee without notice of the grantor's insanity, and against an innocent purchaser from such immediate grantee. In the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee.—DEWEY v. ALGIRE, Neb., 55 N. W. Rep. 276.

38. DETINUE—Replevin.—Replevin in the detinet will lie against an assignee for the benefit of creditors, who has invoiced and sold, as assets of his assignor, lumber ordered before the assignment, but refused on delivery, as not of the quality ordered, where the assignee was notified as to its true ownership, and warned not to invoice it.—STARKE v. PAINE, Wis., 55 N. W. Rep. 185.

39. ELECTIONS—Depositing Ballot in Wrong Box.—Where, at an election, two ballot boxes are provided, one for ballots for judges, and another for ballots for municipal officers, and some of the ballots cast are deposited in the wrong box, the voters will not be deprived of there rights by the mistake or fraud of the election officers in so doing.—STATE v. HORAN, Wis., 55 N. W. Rep. 151.

40. EMINENT DOMAIN — Compensation. — To entitle a person to damages for an appropriation of his land by a railroad company, and for injuries to the remainder of his land caused by such taking, it is not essential that the original entry by such company be wrongful, or that the occupation became wrongful by matter subsequent to the entry; a right to such damages not being predicated on the wrong or trespass on the land, but on a constitutional right to compensation as for the appropriation of a part, and damages to the residue.—WEBSTER v. KANSAS CITY & S. RY. CO., Mo., 22 S. W. Rep. 414.

41. EVIDENCE — Declarations by Attorneys. — Where an attorney is retained, not only to sue a railroad company for damages caused by an accident, but also to present the plaintiff's claim to the company, and obtain settlement of it without suit, if possible, a letter written by his clerk, under his directions, to an officer of the company, stating what purported to be the facts in the case, in response to an inquiry by the company, is admissible in evidence for the company as a declaration by the plaintiff as to the facts.—LOOMIS v. NEW YORK, N. H. & H. R. Co., Mass., 34 N. E. Rep. 82.

42. EVIDENCE — Mental Unsoundness.—In an action involving the issue whether a person is of "unsound mind and incapable of managing his estate," presented by Rev. St. 1881, § 2545, a witness may state his opinion as to the mental unsoundness of the person or the manifestations thereof, but not as to whether the degree of incapacity has been reached; that being the question for determination of the jury. — HAMRICK v. STATE, Ind., 34 N. E. Rep. 3.

43. FEES OF COUNTY MARSHAL. — Under Act 1891, entitled "Fees of Officials" (section 11), providing that the sheriff, marshal, or other officer who shall have in custody or under his charge any person "undergoing examination preparatory to commitment" shall for transporting, safe-keeping, and maintaining such person receive a certain amount for every day he may have such person under his charge, a county marshal

is not entitled to such fee where a prisoner is in his custody as jailer, committed under authority of Rev. St. 1889, §§ 4028, 4030, pending a continuance of his examination.—STATE v. WOFFORD, Mo., 22 S. W. Rep. 486.

44. FRAUDULENT CONVEYANCE — Execution Sale.—Where the owner of land procures one of his creditors to levy an execution on the land, buy it in at execution sale, and hold the land for his secret benefit such conveyance is void as against creditors. — BOSTWICK v. BLAKE, Ill., 34 N. E. Rep. 38.

45. INSURANCE—Incumbrances.—Where a clause of an insurance policy provided that the entire policy should be void if the assured had or should procure other insurance, or incumber the property by mortgage, the existence of a mortgage and prior insurance on the insured property invalidated such policy, though the assured was not examined as to whether his property was incumbered, or verbally informed of the effect of such prior insurance or incumbrance, by defendant, such facts not constituting a waiver of the condition.—WILCOX v. CONTINENTAL INS. CO., Wis., 55 N. W. Rep. 188.

46. INTOXICATING LIQUORS—Criminal Prosecution.—Where the complaint and affidavit on which defendant was arrested charged a violation of an ordinance regulating the sale of liquor by a specified act of defendant, and the agreed statement of facts on which the case was tried showed that, if defendant was guilty at all, it was another and different offense, the variance is fatal.—MILLER v. CITY OF COLORADO SPRINGS, Colo., 33 Pac. Rep. 74.

47. JUDGMENT OF APPELLATE COURT — Review. — A judgment of affirmance by the Illinois Appellate Court conclusively settles all questions of fact in favor of the appellee, even though the opinion handed down in the appellate court contains intimations at variance with the verdict, since the opinion is no part of the record.—BERNSTEIN v. ROTH, Ill., 34 N. E. Rep. 37.

48. JUDGMENT BY DEFAULT.—Where defendants were served with summons it is immaterial, as affecting a judgment by default against them, whether or not an attorney who appeared for them was authorized to do so, since in either event the judgment was proper.—HUNTER v. BYRANT, Cal., 33 Pac. Rep. 55.

49. JUDGMENT—Jurisdiction.—A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity. — LINCOLN NAT. BANK v. VIRGIN, Neb., 55 N. W. Rep. 218.

50. LANDLORD — Storage of Goods.—The fact that a landlord, on rightfully taking possession of leased premises, finds himself involuntarily in possession of a stock of goods left by an outgoing tenant, which are mortgaged to their full value, and which the mortgagee declines to take into possession, or pay for storing, does not give the landlord a right of action against the mortgagee to recover compensation for storage, and to reach, in payment therefor, his interest in the goods, although the remedy by suit against the mortgagor is worthless —FIELD v. ROOSA, Mass., 34 N. E. Rep. 77.

51. LIBEL. — A letter, written by one of two rivaled milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, as such seller paid nothing to his shippers, is libelous *per se*.—BROWN v. VANNAMAN, Wis., 55 N. W. Rep. 183.

52. LIMITATIONS — Open Account. — Where a mutual account exists between persons having dealings in cattle, and money is loaned by one to the other at various times, and after the cattle transactions cease no settlement is had, but other loans are made, the presumption arises that the open account continues to such loans. — CHADWICK v. CHADWICH, Mo., 22 S. W. Rep. 279.

53. LIMITATION OF ACTIONS.—In an action for trespass the petition alleged that defendants wrongfully entered on plaintiff's land, and cut and carried away timber of the value of $2,000, and asked judgment for $6,000. An amended petition was filed, containing the same allegations, and asked judgment for $2,000: Held, that the amended petition set out a common-law cause of action for trespass, and was not under Rev. St. 1889, § 8675, providing for recovery of treble damages for cutting timber, and therefore the three years' limitation (Rev. St. 1889, § 6776) of actions for a penalty under a statute does not apply. — STODDARD COUNTY v. MALONE, Mo., 22 S. W. Rep. 469.

54. MARRIED WOMAN. — In an action by a married woman for personal injuries she may recover medical expenses, though her husband is liable therefor.—CITY OF COLUMBUS v. STRASSNER, Ind., 34 N. E. Rep. 5.

55. MARRIED WOMAN — Estoppel in Pais. — Plaintiff and her husband, who owed defendant money on notes, represented, when such notes fell due, that the husband was ready to pay them; that plaintiff wanted to borrow the money due defendant to use on her separate estate, on which she would give a mortgage to secure the loan. Defendant thereupon took her note and mortgage, and, by mutual agreement, defendant surrendered the notes to the husband, directing him to pay the money to plaintiff, who, together with her husband, agreed to the arrangement: Held, that plaintiff was bound by such representations, and estopped from denying the truthfulness thereof in order to avoid the mortgage; Rev. St. 1881, § 5117, providing that a married woman shall be bound by estoppel *in pais* like any other person. — WERTZ v. JONES, Ind., 34 N. E. Rep. 1.

56. MASTER AND SERVANT — Assumption of Risk.—A servant of full age and ordinary intelligence who, in order to adjust appliances, stands on a narrow, convex ledge at a distance from the ground, as shown how to do by the overseer, without the means of safely supporting himself, after having several times performed the task cannot recover from his master if he falls and is injured, as the danger is obvious, and he assumes the risk. — WILSON v. TREMONT & SUFFOLK MILLS, Mass., 34 N. E. Rep. 90.

57. MASTER AND SERVANT — Negligence of Fellow-servant.—In an action by an employee of a steamship company for injuries received from falling down an unlighted hatchway, it appeared that the electric lights on the vessel had gone out, by an accident, which the engineer could have repaired, and that there were lanterns that might have been used in their place: Held, that the company was not liable, since the injury was caused by the negligence of the plaintiff's fellow-servants. — MELLEN v. WILSON'S SONS STEAMSHIP CO., Mass., 34 N. E. Rep. 96.

58. MASTER AND SERVANT—Risks of Employment.—A switchman who is injured by catching his foot in a space between the planking covering the railroad yards is not entitled to recover damages therefor where, at the time of the accident, he had been working in that yard for six weeks, during all of which time the planking had remained in the same condition. —GLEASON v. NEW YORK & N. E. R. CO., Mass., 34 N. E. Rep. 79.

59. MECHANIC'S LIEN—Estoppel.—The mere fact that a married woman permits her husband to erect buildings on her land, her title being of record, does not estop her, as against one claiming a mechanic's lien, from denying that the land belongs to her husband, or from denying that he contracted for the buildings as her agent.—CAMPBELL v. JACOBSON, Ill., 34 N. E. Rep. 39.

60. MECHANICS' LIENS—Fair Grounds.—A decree establishing mechanics' liens on the entire premises constituting the fair grounds of an agricultural society, consisting of about 60 acres of land, with race track, grand stand, corrals, stables, and other improvements thereon, in favor of persons who constructed a building on such grounds to be used as an hotel, club house, and saloon, is erroneous.—TUNIS v. LAKEPORT AGRICULTURAL PARK ASS'N., Cal., 32 Pac. Rep. 63.

61. MECHANICS' LIENS—Priority.—In a suit to fore close a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material.—HENRY & COATSWORTH CO. v. MCCURDY, Neb., 55 N. W. Rep. 261.

62. MINING CLAIM—Relocation.—Where a person who has located a mining claim permits an adjoining occupant to patent that part of his claim on which is located his discovery shaft, the remaining portion thereof reverts to the condition of public lands, and is relocatable; and such rule applies, though the patentee made his location after such person.—MILLER V. GIRARD, Colo., 33 Pac. Rep. 69.

63. MORTGAGE — Foreclosure — Advertisement.—The fact that the advertisement of a mortgage sale did not state that the land was improved is not a sufficient reason for setting aside the sale.—AUSTIN V. HATCH, Mass., 34 N. E. Rep. 95.

64. MORTGAGE — Agreement to Release.—An agreement by a mortgagee to release his mortgage whenever it should appear that the one personally liable on the mortgage debt would suffer loss unless the same was released does not entitle the latter to a release because the mortgage is about to be foreclosed, since he could not be said to suffer loss by a foreclosure.—IRWIN V. BROWN, Ill., 34 N. E. Rep. 43.

65. MORTGAGE—Foreclosure — Redemption.—Where a mortgagee pledges the note and mortgage to secure a loan, and the pledgee forecloses the mortgage, making the mortgagee a party defendant, and obtains a decree foreclosing the rights of all the defendants, and the pledgee buys the property at foreclosure sale, and obtains a deed therefor, he holds title free from any right of redemption on the part of the mortgagee.—ANDERSON V. OLIN, Ill., 34 N. E. Rep. 55.

66. MORTGAGES—Recording.—In Louisiana the failure to reinscribe a mortgage within 10 years from its first inscription, as required by the statutory law, renders it without effect as to all persons whomsoever who are not parties thereto; and the failure to so reinscribe the mortgage is not remedied or supplied by the pendency of a suit to foreclose the same.—PICHETT V. FOSTER, U. S. S. C., 13 S. C. Rep. 998.

67. MORTGAGE — Usury. — Money deducted from a mortgage loan, and paid to attorneys, at the mortgagor's request, for examining the title to the mortgaged property, and money deducted therefrom, and paid as commission to the agent who secured the loan for the mortgagor, does not constitute usury.—GOODWIN V. BISHOP, Ill., 34 N. E. Rep. 47.

68. MUNICIPAL CORPORATION — Livery Stables.—The authority given a city to regulate livery and sale stables includes the power to designate the places where they may be located.—CITY OF ST. LOUIS V. RUSSELL, Mo., 22 S. W. Rep. 470.

69. MUNICIPAL CORPORATIONS—Paving Streets—Street Railroad.—Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars over such street during the paving of the same, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference.—MILWAUKEE ST. RY. CO. V. ADLAN, Wis., 55 N. W. Rep. 181.

70. NEGLIGENCE — Personal Injuries— Evidence.—In an action against a railroad company for personal injuries caused by falling into an unguarded pit adjoining defendant's track, evidence of admissions of defendant's solicitor respecting notice of the existence of the pit, in the absence of evidence that he had authority to make them, is inadmissible, and is not rendered harmless by the fact that there was also circumstantial evidence of notice.—OHIO & M. RY. CO. V. LEVY, Ind., 34 N. E. Rep. 20.

71. NEGLIGENCE—Railroad Watchman.—Where a day watchman in the employ of receivers of a railroad company fails to use ordinary care in removing a boy from a moving car on which the latter is riding in violation of a city ordinance making such act a misdemeanor, the receivers are liable for any injuries to the boy caused by the negligence of such watchman — BRILL V. EDDY, Mo., 22 S. W. Rep. 485.

72. NEGOTIABLE INSTRUMENT—Possession by Maker after Maturity.—The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment.—SMITH V. GARDNER, Neb., 55 N. W. Rep. 245.

73. NEGOTIABLE INSTRUMENTS—Holders for Value.—One to whom a note is indorsed as collateral security for a pre-existing debt is not a holder thereof for value, and takes subject to the equities between the original parties.—PEIGH V. HUFFMAN, Ind., 34 N. E. Rep. 32.

74. NEGOTIABLE INSTRUMENT—Protest.—The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter.—WOOD RIVER BANK V. FIRST NAT. BANK, Neb., 55 N. W. Rep. 239.

75. NUISANCE—Injuction.—A bill by the occupant of one floor of a manufacturing building against the occupants of the floor above for an injunction and damages, which alleges that defendants use sand and acids in their business, and that they allow these substances to sift and come through holes in the floor, which are properly there, whereby complainant's machinery is damaged, is good as against a demurrer.—BOSTON FERRULE CO. V. HILLS, Mass., 34 N. E. Rep. 85.

76. OLEOMARGARINE—Notice.—Under St. 1891, ch. 412, § 5, which requires every person who furnishes to a guest in a restaurant or hotel oleomargarine or butterine, instead of butter, to notify him that the substance furnished is not butter, it is not sufficient to put up in a restaurant conspicuous signs, reading, "Butterine Used Only Here," and to print on the bill of fare, "Only Fine Butterine Used Here," where it is shown that the guest to whom butterine was furnished instead of butter neither saw the signs nor read the bill of fare.—COMMONWEALTH V. STEWART, Mass., 34 N. E. Rep. 84.

77. PARTITION.—Where a cotenant in possession of land has received all the rents accruing therefrom for a number of years, his cotenant is entitled, on partition of such land, to off-set the rent due him against the value of improvements made by such tenant.—PEDEN V. CAVINS, Ind., 34 N. E. Rep. 7.

78. PARTNERSHIP AGREEMENT.—A provision in a contract between partners, whereby an adjustment of past accounts should be had, in order to make a rest in the affairs of the firm to furnish a basis for future accountings is no consideration for another provision in such contract, whereby each agrees to pay the other interest on his monthly balances from the time they first engaged in business up to date of such contract.—SMITH V. KNIGHT, Iowa, 55 N. W. Rep. 189.

79. PLEADING IN JUSTICE'S COURT.—Under Rev. St. § 138, providing that no formal pleading shall be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in an action for damages caused by fire set out by defendant's train, which does not allege negligence, is sufficient on objection raised after verdict.—POLHANS V. ATCHISON, T. & S. F. R. CO., Mo., Mo., 22 S. W. Rep. 478.

80. PLEADINGS—Cross-petition.—After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his codefendants who have not appeared in the action, such codefendants can be concluded in respect thereto only by their appearance, or after the service on them of a notice, in the nature of a summons, as to such pleading.—ARNOLD V. BADGER LUMBER CO., Neb., 55 N. W. Rep. 269.

81. PRINCIPAL AND AGENT—Powers of Agent.—Where, in an action to recover for fitting out defendant's hotel

with an electric light plant, it appeared that the work was done under an agreement with defendant's agent, and not through any personal agreement with defendant, an instruction that if defendant authorized the work to be done, either personally or through an agent, he would be liable, is erroneous, in that under it the jury probably failed to consider the question of the extent of such agent's authority to bind defendant as to the contract, and might infer that under such agency the authority existed to have the work done.—FISK v. GREELEY ELECTRIC LIGHT CO., Colo., 33 Pac. Rep. 70.

82. PRINCIPAL AND AGENT—Sale of Land—Purchase by Agent.—An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency, and his relation to his principal forbids his becoming a purchaser thereof for his own benefit, in any way, without the full knowledge by the principal of this fact, and the principal's acquiescence therein, with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent.—JANSEN v. WILLIAMS, Neb., 55 N. W. Rep. 279.

83. PROCESS — Writs — Service.—Before a summons can be rightfully issued from one county to another, the person served with the summons in the county in which the action is brought must have a real and substantial interest in the subject of the action, adverse to the plaintiff, and against whom some substantial relief may be obtained; and the action must be rightfully brought in the county in which it is brought, and as against the person served with summons in such county.—WELLS v. PATTON, Kan., 33 Pac. Rep. 15.

84. PUBLIC LAND — Entry on Government Land.—A person who, in the absence of another, who is in the actual possession of government land which is open to settlement under act of congress, peaceably enters on such land with intent to take it up as a homestead, is not entitled to retain possession as against such prior occupant, in the absence of any right or title acquired from the government.—ROURKE v. MCNALLY, Cal., 33 Pac. Rep. 62.

85. QUIETING TITLE — Res Judicata.—An action to quite title to lands conveyed on conditions subsequent, because of a breach of such conditions, was dismissed without prejudice, on the ground that the complaint stated the date of re-entry as preceding the date of the breach: Held, that such action and judgment therein do not bar another action for the same relief, alleging a subsequent breach and re-entry.—ELKHART CARWORKS CO. v. ELLIS, Ind., 34 N. E. Rep. 11.

86. RAILROAD COMPANY — Crossing.—A person on a highway crossing a railroad has the right to presume that the servants of the railroad company will apprise him of an approaching train by giving the statutory signals.—EVANSVILLE & T. H. R. CO. v. MAROHN, Ind., 34 N. E. Rep. 27.

87. RAILROAD COMPANY—Negligence.—Where a railroad knowingly maintains a bridge over its track so low as to endanger any one standing on a refrigerator or other high car, and a brakeman, passing at night, without knowledge of the danger, is struck and injured, the company is liable.—PENNSYLVANIA CO. v. SEARS, Ind., 34 N. E. Rep. 16.

88. RAILROAD COMPANIES—Organization.—Under the general law providing for the incorporation of railroad companies, a circular or terminal railroad may be projected and constructed, and a company organized for that purpose may exercise the power of eminent domain.—STATE v. MARTIN, Kan., 33 Pac. Rep. 9.

89. RAILROAD COMPANIES — Street-railway — Negligence.—Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented.—SPELLMAN v. LINCOLN RAPID TRANSIT CO., Neb., 55 N. W. Rep. 270.

90. REAL ESTATE AGENT — Commissions— Cotenants.—Where land is owned by two tenants in common, and is placed in charge of one, who sells it through a broker, the owners are jointly liable for the broker's commissions.—CLIFFORD v. MEYER, Ind., 34 N. E. Rep. 24.

91. REAL ESTATE BROKER — Compensation.—When a real estate broker is employed to produce a purchaser of real property he is entitled to compensation when he has secured a proposed purchaser, ready, able, and willing to buy the property on the terms and conditions upon which the said broker was authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed.—JONES v. STEVENS, Neb., 55 N. W. Rep. 251.

92. RECORD—Notice.—The indexes in the office of the register of deeds disclosed conveyances as follows: "——to Mary A. Allely, deed. Mary A. Allely to Hooper, mortgage. Mary A. Allely to Vickars, mortgage:" Held, that Vickars, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed "Mary A. Alley," was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely.—PHILLIPS v. MCKAIG, Neb., 55 N. W. Rep. 259.

93. REPLEVIN BY MORTGAGEE — Costs.—Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff.—RODGERS v. GRAHAM, Neb., 55 N. W. Rep. 243.

94. REPLEVIN.—Where a defendant lawfully in the possession of property denies the title and right of possession of the owners, no demand is necessary.—OGDEN v. WARREN, Neb., 55 N. W. Rep. 221.

95. REPLEVIN FOR PROPERTY SEIZED UNDER EXECUTION.—An action will not lie against a sheriff to recover property seized under execution issued on a judgment rendered by a court of general jurisdiction, where it is not alleged that the court rendering the judgment did not have jurisdiction of the subject-matter, that the execution was defective, or that the property was exempt, but merely that the judgment is void because there never was any original notice, either actual or constructive, served on plaintiff, and the same was rendered wholly without jurisdiction.—MORGAN v. ZENOR, Iowa, 55 N. W. Rep. 197.

96. SALE—Rights of Seller.—Where a vendee refuses to accept chattles bought until the vendor has recovered judgment against him for the price, the vendor has no right of recovery against him for the care of the chattels between the sale and the delivery, since his care of them during that time is for his own benefit.—PUTNAM v. GLIDDEN, Mass., 34 N. E. Rep. 81.

97. SALE—Warranty.—Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose, of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied.—OMAHA COAL, COKE & LIME CO. v. FAY, Neb., 55 N. W. Rep. 211.

98. SPECIFIC PERFORMANCE — Equity — Practice.—Where, in a suit for specific performance of a contract for the sale of land, it appears that the vendor had conveyed the land to an innocent third person, and that the vendee knew that fact before he began his suit, it is proper for the court to dismiss the suit altogether, leaving the vendee to his remedy at law for damages.—SAUER v. FERRIS, Ill., 34 N. E. Rep. 52.

99. STATUTE — Enactment—Approval of Governor.—The governor is a part of the law-making power of the State, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted.—STATE v. CROUNSE, Neb., 55 N. W. Rep. 246.

100. TAXATION — "Merchants' Goods" — Pine Logs.—Pine logs kept for sale are "merchants' goods, wares, and commodities," within the meaning of Sanb. & B. Ann. St. § 1040, providing that such property shall be assessed in the district where located.—TOWN OF EAGLE RIVER v. BROWN, Wis., 55 N. W. Rep. 163.

101. TRIAL—Duress.—Where a defendant admits the execution of a written instrument, but seeks to avoid liability thereon, on the ground that it was executed under duress, the trial court should instruct the jury as to what constitutes duress.—MCCORMICK v. VOLSACK, S. Dak., 55 N. W. Rep. 145.

102. TRIAL—Misconduct of Juror.—A juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts in the case within his own personal knowledge, but not given in evidence. He should make the same known during the trial, and, if desired, testify as a witness in the case.—WOOD RIVER BANK v. DODGE, Neb., 55 N. W. Rep. 284.

103. TRIAL BY COURT—Presumptions.—Where an action at law is tried by the court without a jury, and no propositions of law are submitted to the court, it will be presumed on appeal that the trial court correctly applied the law to the facts.—ATKINSON CAR-SPRING WORKS v. BARBER, Ill., 34 N. E. Rep. 33.

104. VENDOR AND VENDEE—Notice of Equitable Title.—A purchaser of land, who before purchase has seen the deed to his grantor, in which the consideration named is much less than the value of the land, and who has been informed that a third person owned the land, is chargeable with notice of said third person's equitable right to the land.—MASON v. MULLAHEY, Ill., 34 N. E. Rep. 36.

105. WITNESS—Confidential Communications—Wills.—Where an attorney who drew a will signs it as a witness at the request of testatrix, he is free, in an action to contest the will, to testify to any fact in regard to the will and its execution which he learned by virtue of his professional relation.—IN RE PITT'S ESTATE, Wis., 55 N. W. Rep. 149.

106. WITNESS—Transactions with Decedent.—A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction.—PARRISH v. MCNEAL, Neb., 55 N. W. Rep. 222.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

MASTER AND SERVANT—Discharge—Practice.—A servant employed for a year and wrongfully discharged before the expiration of the term, may treat the contract as continuing and bring a special action against the master for breach of it, whether his wages were paid up to the period of his discharge, or not. In such cases the measure of damages cannot exceed the contract price, neither is it necessarily the full contract price, for plaintiff may have obtained employment elsewhere. An appeal or writ of error cannot properly be taken from the action of a court in sustaining a motion under Sec. 2235, Rev. Stat. 1889, to vacate a judgment at a term subsequent to the term at which it was rendered. The remedy of the party aggrieved is to take a bill of exceptions, proceed no further in the cause, suffer a final judgment to go against him, and then prosecute his appeal or writ of error.—HALSEY v. MEINRATH.

PARTITION — Proceeds of Sale—Personalty.—A non-resident owner of an interest in land was made a party to a partition suit, and brought into court by order of publication. The land was sold by order of court. The non-resident never called for his money. For seven years he was not heard from, and the presumption of his death obtained. In a suit by public administrator for said money, still in the hands of the commissioner: Held, the proceeds of the sale pass to the administrator and do not descend to the heirs.—STATE EX REL. HEY v. HARPER.

PLEADING—City—Repair of Streets.—The petition in an action against a city for personal injury, need only charge that the street, where the injury occurred, constituted a public highway of the city, at the time of the happening of the injury complained of. It is not necessary to allege that the street had been formally laid out by ordinance. Streets are opened and established not merely by ordinance, but likewise by user, and by dedication and acceptance, and the duty on the part of the city, to keep such of its streets as are necessary for the convenience and use of the traveling public, in a reasonably safe and good condition for such use, attaches whether it becomes a street by use, or by dedication or acceptance.—GOLDEN v. THE CITY OF CLINTON.

SPECIAL TAX BILL—Kansas City Charter—Limitation.—The charter of Kansas city, Sec. 4, p. 252, Laws 1875, provides that "every tax bill shall be a lien on the property therein described, on the date of the receipt to the city engineer therefor, and such lien shall continue for two years thereafter, but no longer, unless suit be brought to collect the same within two years from the date of the issue thereof, etc." In a suit on a special tax bill issued for constructing a sidewalk in said city, held, "issue" means delivery, and that the limitation begins to run against the bill from the time of delivery and not from the date of receipt given to the engineer.—FOLKES v. YOST.

SURETYSHIP—Subrogation.—A surety who pays the debt of his principal, stands, as against his principal, in the shoes of the creditor, and can take advantage of all rights which the creditor could have enforced. The right of the surety to be subrogated accrues at the time he enters into the obligation of surety. No subsequent manipulation of the securities, without the consent of the surety, can affect his rights. He is not required to pay a subsequent mortgage in order to be subrogated to the securities which the creditor holds for the debt for which he is surety.—THE SCHELL CITY BANK v. REED.

TAX BILL—Railroad Right of Way—Lien.—In an action to enforce certain tax bills for grading a street, which ran across the defendant's right of way, in Kansas City: Held, the terms of the city charter (Laws 1875, p. 250), providing that the cost of grading a street shall be charged as a lien on the land abutting on or adjoining the highway, are general enough to embrace the right of way of a railroad, but it is against the policy of the law to permit the enforcement of a lien against a detached portion of a railroad, and such a lien will not be enforced against a mere fractional part of its right of way, unless it be especially authorized by the legislature in language not to be misunderstood.—SWEENEY v. K. C. BELT RY. CO.

USURY—Evidence of.—It is not necessary to prove by positive testimony an agreement to pay usury. Such an agreement may be inferred from all the facts and circumstances in the case. There is no device or shift to evade the statute under or behind which the court will not look, no act however formal, no deed however solemnly executed, will be allowed to hinder the court, in its efforts to ascertain whether there has been an attempt to evade the statute.—THE FIDELITY LOAN GUARANTEE CO. v. BAKER.